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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992	))))	MM Docket No. 92-264

To: The Commission

REPLY COMMENTS
OF THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

The National Cable Television Association, Inc. ("NCTA"), by its attorneys, and pursuant to Section 1.429(g) of the Commission's rules, hereby submits its reply to comments on the Petition for Reconsideration ("Petition") filed by the Center For Media Education ("CME") and the Consumer Federation of America ("CFA") in the above-captioned proceeding.

The numerous oppositions to the CME/CFA Petition demonstrate that reconsideration of the horizontal and vertical ownership limits adopted by the Commission is wholly unwarranted and unjustified.[1/] Indeed, there is no rational basis to

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1/ See Oppositions to Petition for Reconsideration filed by National Cable Television Association, Inc, Tele-Communications, Inc., Time Warner Entertainment Company, L.P., Liberty Media Corporation, Turner Broadcasting System,

(Footnote continues on next page)

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revisit the Commission's conclusions, which represent a careful balancing -- based on record evidence -- of the competing policy objectives in the 1992 Cable Act, notably preserving the substantial efficiencies and other benefits of cable industry consolidation and protecting against the potential harm of excess concentration.

As NCTA and other opposing parties argued, the CME/CFA Petition should be summarily dismissed on the grounds that it rehashes arguments that have already been fully considered by the Commission in an exhaustive rulemaking proceeding. It also presents a lop-sided analysis of section 11 by ignoring statutory directives and legislative history recognizing the benefits of horizontal and vertical cable ownership. By challenging the Commission's thorough examination of the issues and sound exercise of discretion with unproven claims and conclusory statements about MSO market power, the Petitioners' case for more stringent limitations is without merit.

Thus, all of the commenting parties, except Viacom International, Inc. ("Viacom"), urge the Commission to reject the CME/CFA Petition. Viacom partially supports the CME/CFA

(Footnote continued)

Inc., U S West Communications, Inc., Bell Atlantic Corporation, GTE Service Corporation, BellSouth Telecommunications, Inc., Affiliated Regional Communications, Ltd.

petition, recommending that the Commission reduce the subscriber limits from 30 percent to 15 percent or, in the alternative, reduce the channel occupancy limits from 40 percent to 20 percent for any cable operator which reaches horizontal concentration of at least 15 percent of homes passed. In advocating sweeping structural limitations on cable ownership, Viacom, like the Petitioners, speculates about the interplay between horizontal and vertical ownership but fails to produce any evidence to refute the Commission's findings.

The Commission did not, as Viacom argues, establish subscriber limits without citing specific record evidence nor did it give inappropriate weight to other provisions of the Act designed to address anticompetitive behavior. As the Second Report and Order makes clear, the Commission determined based on the preponderance of data in the record, that the 30 percent horizontal limit was reasonable to prevent the nation's largest MSOs from gaining enhanced leverage from increased concentration.[2/] In addition, it found that the "cumulative effect" of the 30 percent horizontal limit, the 40 percent vertical limit and other provisions of the Act aimed at preventing cable operators from exercising undue power over unaffiliated programmers and ensuring diversity of views on cable channels should protect against any one cable operator exerting

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2/ Second Report and Order, MM Docket No. 92-264, FCC 93-456 (released October 22, 1993) ("Second Report and Order") at para. 25.

excessive market power.[3/] But standing alone, the 30 percent horizontal limit is low enough by any measure to provide an independent basis for constraining excess market power in the cable programming market.

Furthermore, as NCTA pointed out in its Opposition, the divestiture issue was not the "driving factor" in determining whether one level of horizontal ownership will be more effective than another in minimizing anticompetitive conduct.[4/] Indeed, the Commission, in concluding that a 30 percent limit was reasonable, stated that "we considered a number of factors including the indication in the legislative history of this provision that Congress did not intend necessarily to require the divestiture of any existing interests."[5/] Based on review of the record, the Commission concluded that

> in the absence of definitive evidence that existing levels of ownership are sufficient to impede the entry of new video programmers or have an adverse affect on diversity, existing arrangements should not be disrupted.[6/]

Thus, the decision not to disrupt existing arrangements and thereby create subscriber confusion was reasonable,

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3/ Second Report and Order at para. 26.

4/ Comments of Viacom at 7; NCTA Opposition at 7-8.

5/ Second Report and Order at para. 27; S. Rep. No. 92, 102d Cong., 1st Sess. 34 ("The legislation does not imply that any existing company must be divested and gives the FCC flexibility to determine what limits are reasonable.")

6/ Second Report and Order at para. 27.

particularly in light of the Act's directive "to take account of the market structure, ownership patterns, and other relationships in the cable industry" in setting ownership restrictions.[7/]

With regard to the vertical ownership limit, there is absolutely no empirical basis for reducing the limit to an arbitrarily low 20 percent for cable systems that in the aggregate reach 15 percent of cable subscribers. In fact, there is nothing in the record to indicate that vertically-integrated MSOs that have attained horizontal ownership interests significantly higher than 15 percent have the wherewithal to favor their affiliated programming services at the expense of nonaffiliated programmers.[8/] What the record does show, however, is that vertical integration has brought about unquestionable public interest benefits:

> First, MSO investment has produced a wealth of high quality cable programming services. Many of the most popular cable programming services were inititated or sustained with the help of MSO investment. Second, vertical integration between cable operators and video programming services

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7/ 47 U.S.C. section 533 (f)(2). As to Viacom's contention that lower horizontal limits are necessary because the success of a national programming service depends on whether it is able to reach a "critical mass" of roughly 40 million of the estimated 57 million cable households, we submit that the record is replete with evidence that many existing cable programming networks have prospered with penetration levels well below 40 percent of cable subscribers. See e.g. Comments of Time Warner Entertainment Company, Tele-Communications, Inc.

8/ During the lengthy rulemaking process, not one unaffiliated programmer filed comments asserting that any vertically-integrated cable company discriminated based on affiliation.

> appears to produce efficiencies in the distribution, marketing, and purchase of programming. Third, vertical integration can reduce programming costs, which in turn may reduce subscriber fees and cable rates. Fourth, vertical integration may in certain circumstances foster investment in more innovative and riskier video programming services.[9/]

As the Commission found in the Second Report and Order, the 40 percent vertical limit fairly balances Congress' goals of ensuring that vertically-integrated cable operators do not favor their affiliated programmers or impede the flow of programming while encouraging MSOs to invest in the development of diverse and high quality programming services. When combined with the channel capacity that operators must already devote to the carriage of unaffiliated local broadcast, leased access and PEG programming and the specific behavioral restrictions prohibiting discrimination by vertically-integrated companies, the existing vertical ownership limit provides a more than sufficient structural safeguard.

In sum, NCTA submits that the Commission should not formulate structural regulations that will impact the entire cable industry based on unproven allegations about the actions of particular companies and speculation about future consolidation. Congress surely did not want the FCC to adopt stringent limitations industry-wide where there is no present evidence of anticompetitive behavior. If subsequent market conditions

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9/ Second Report and Order at para. 68.

warrant a second look at horizontal and vertical concentration, the Commission has a mechanism in place for review of the ownership limits every five years to determine if they still serve the objectives of the Act.[10/] But the Commission should not jeopardize the on-going benefits of horizontal and vertical concentration by giving further consideration to the draconian proposals put forth by CME and CFA in this proceeding.

CONCLUSION

The Commission should deny the CME/CFA Petition for Reconsideration and reaffirm its existing ownership limits.

Respectfully submitted,

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February 28, 1994

10/ Second Report and Order at para. 40; 47 U.S.C. section 533 (f)(2)(E).

CERTIFICATE OF SERVICE

I, Tonya K. Bartley, hereby certify that, on this 28th day of February, 1994, have served a copy of the foregoing "REPLY COMMENTS OF THE NATIONAL CABLE TELEVISION ASSOCIATION, INC." by first-class U.S. mail, postage prepaid, upon:

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